

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 MARK DECLEMENTS,

11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN, Acting  
14 Commissioner of the Social Security  
Administration,

15 Defendant.  
16

CASE NO. 14-cv-05069 JRC

ORDER ON PLAINTIFF'S  
COMPLAINT

17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and  
18 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.  
19 Magistrate Judge and Consent Form, ECF No. 5; Consent to Proceed Before a United  
20 States Magistrate Judge, ECF No. 6). This matter has been fully briefed (*see* ECF Nos.  
21 20, 24, 25).

22 After considering and reviewing the record, the Court concludes that the ALJ's  
23 finding that plaintiff's hernia was not a severe impairment prior to May 27, 2002 is based  
24

1 on substantial evidence in the record as a whole. Prior to October, 2001, plaintiff had  
2 indicated that he was suffering from left flank pain, which was diagnosed as related to a  
3 1mm stone in his bladder. In October, 2001, plaintiff indicated that he had been  
4 experiencing abdominal pain for a couple of weeks and was diagnosed with a right  
5 inguinal hernia. Plaintiff sought medical services again following his release from  
6 incarceration in January, 2002 and was given Vicodin for pain. Although plaintiff was  
7 told on January 16, 2002 to follow up with another doctor as soon as possible, plaintiff  
8 does not appear to have sought medical services for almost three months, and was  
9 referred for a medical examination following his application for welfare benefits in April,  
10 2002. The relevant period of time for this appeal is from January 16, 2002, his amended  
11 alleged onset date, until his date last insured of March 31, 2002. As plaintiff was not  
12 seeking medical treatment during this time, and because plaintiff's treatment record does  
13 not demonstrate the existence of a severe impairment expected to last at least twelve  
14 months before his date last insured of March 31, 2002, the ALJ's finding that plaintiff did  
15 not suffer from a severe impairment of a hernia prior to March 31, 2002 is based on  
16 substantial evidence in the record as a whole.  
17

18 Therefore, this matter is affirmed pursuant to sentence four of 42 U.S.C. § 405(g).  
19

### 20 BACKGROUND

21 Plaintiff, MARK J. DECLEMENTS, was born in 1959 and was 42 years old on  
22 the amended alleged date of disability onset of January 16, 2002 (*see* AR. 33, 74-76).  
23 Plaintiff has a GED (*see* AR. 1200). Plaintiff last worked at North Coast Yachts cleaning  
24 up and doing general labor (AR. 36). He testified that he left this job because he "was

1 having a hard time just functioning and as far as life after being released from prison; []  
2 didn't really have anywhere to go; [] never had taken care of [himself] before like that;  
3 and [] just, things were getting kind of overwhelming" (AR. 36-37). He also testified that  
4 he had difficulties with depression and confusion at that job (*see* AR. 37). He testified  
5 that he was fired, and also that "it was kind of a mutual agreement" (*see* AR. 52).

6         It appears that plaintiff was in prison for a drug related offense (*see* AR. 39, 46-  
7 47). Plaintiff testified that he used methamphetamine and heroin each about ten times  
8 after he left prison, and then he entered rehabilitation just before he was shot in May,  
9 2002 (AR. 37-38). Plaintiff testified at his May 1, 2006 hearing that he had one drug  
10 relapse after his rehabilitation (AR. 39). However, at his August 23, 2010 hearing,  
11 plaintiff indicated that he had another relapse with methamphetamine in 2007 or 2008 for  
12 a short period of time, and was incarcerated for eight months in 2008 (AR. 1208, 1211).

14         Plaintiff could not remember when he went to the emergency room and was  
15 diagnosed with hernias, but he recalled that one hernia was repaired after he was shot  
16 (AR. 41). However, he testified that the repair was not successful as "too much bacteria  
17 was dumped into it" after he was shot through the colon (*see id.*). Plaintiff's testicular  
18 hernia was not repaired during the time of his gunshot surgery, and "then when [he] got  
19 out, it strangulated" (AR. 42). He had "an old type repair" on his testicular hernia,  
20 without a screen or mesh, although he testified that "it's been pretty good" (*see id.*). At  
21 his 2010 hearing, plaintiff testified that he had three hernia surgeries total (*see* AR. 1214).  
22  
23  
24

1 According to the ALJ in the most recent written decision, plaintiff “had the  
2 following medically determinable impairments: Hepatitis C, Herniated Discs, and Hernia  
3 (20 CFR 404.1521 *et seq.* and 416.921 *et seq.*)” (AR. 744).

4 At the time of the 2010 hearing, plaintiff had been living with a friend with whom  
5 he had been staying for a couple of years (*see* AR. 1212-13).

#### 6 PROCEDURAL HISTORY

7 Plaintiff’s last hearing was held before Administrative Law Judge Gary Elliott  
8 (“the ALJ”) on March 20, 2013 (AR. 741-49). This case has a very complicated  
9 procedural history. The ALJ outlined the history as follows:  
10

11 On March 31, 2003 the claimant protectively filed an application for  
12 Title II disability insurance benefits [DIB] and Title XVI supplemental  
13 security income [SSI]. Initially the Commissioner granted the  
14 application for supplemental security income finding the claimant  
15 disabled as of March 2003. The Title II [DIB] claim was denied  
16 initially on August 31, 2003 and again upon reconsideration on January  
17 27, 2004. The claimant then filed a request for a hearing before an  
18 Administrative Law Judge and a hearing was held on May 1, 2006. A  
19 decision was issued on July 28, 2006 which found that the claimant did  
20 not become disabled until May 27, 2002 [after his March, 2002 date last  
21 insured for DIB]. The claimant requested review of that decision which  
22 was upheld by the Appeals Council and the United States District Court  
23 for the Western District of Washington. The claimant then appealed to  
24 the United States Court of Appeals for the Ninth Circuit which  
remanded the decision back to the Commissioner on February 17, 2010  
[for a hearing with a medical expert]. An Administrative Law Judge  
held a hearing on August 23, 2010 and a supplemental hearing on  
March 1, 2011. A decision denying [DIB] benefits was issued on April  
21, 2011. The Appeals Council issued an order remanding that decision  
to an Administrative Law Judge on August 20, 2012. The claimant  
appeared and testified at a hearing held on March 20, 2013, in Tacoma,  
WA.

(AR. 741). After the March, 2013 hearing, the ALJ issued a written decision on April 11, 2013, which is the subject of this appeal before this Court (*see* AR. 741-49).

In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Did the ALJ err by deciding that the hernia condition was not a severe impairment because it did not meet the durational requirement, contrary to the medical evidence and outside the scope of the Ninth Circuit Court of Appeals remand order; and (2) Did the ALJ fail to obey the order of the Ninth Circuit Court of Appeals and change a step 2 medical finding that had not been disturbed on appeal (*see* Dkt. No. 20, p. 1).

#### STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

#### DISCUSSION

**(1) Did the ALJ err by deciding that the hernia condition was not a severe impairment because it did not meet the durational requirement, contrary to the medical evidence and outside the scope of the Ninth Circuit Court of Appeals remand order?**

First, plaintiff contends that the ALJ's finding that plaintiff's hernia during the relevant period of time was not severe is erroneous.

Step-two of the administration's evaluation process requires the ALJ to determine if the claimant "has a medically severe impairment or combination of impairments."

1 *Smolen v. Chater*, 80 F.3d 1273, 1289-90 (9th Cir. 1996) (citation omitted); 20 C.F.R. §§  
2 404.1520(a)(4)(ii), 416.920(a)(4)(ii) (1996). “An impairment or combination of  
3 impairments can be found ‘not severe’ only if the evidence establishes a slight  
4 abnormality that has ‘no more than a minimal effect on an individual[’]s ability to  
5 work.’” *Smolen, supra*, 80 F.3d at 1290 (*quoting* Social Security Ruling “SSR” 85-28)  
6 (*citing Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)). The Court notes that  
7 plaintiff bears the burden to establish by a preponderance of the evidence the existence of  
8 a severe impairment that prevented performance of substantial gainful activity and that  
9 this impairment lasted for at least twelve continuous months. 20 C.F.R. §§ 404.1505(a),  
10 404.1512(a) and (c), 416.905(a), 416.912(a) and (c); *Yuckert, supra*, 482 U.S. at 146; *see*  
11 *also Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1998) (*citing Roberts v. Shalala*, 66  
12 F.3d 179, 182 (9th Cir. 1995)). Any impairment that does not last continuously for twelve  
13 months does not satisfy the requirement. 20 C.F.R. §§ 404.1505(a), 404.1512(a) and (c),  
14 416.905(a), 416.912(a) and (c); *Roberts, supra*, 66 F.3d at 182.

16 First, the Court notes that, as stated by the ALJ in his written decision, “the  
17 relevant period of consideration for the Title II claim is from the amended alleged onset  
18 date, January 16, 2002 until the date last insured of March 31, 2002, a period covering 75  
19 days” (AR. 741-42). Relevant for this argument, the ALJ found that plaintiff did not have  
20 a severe impairment, “singly or in combination [which] caused more than minimal  
21 limitations on the claimant’s ability to perform basic work activities during the period at  
22 issue” (AR. 744). In so finding, the ALJ noted as follows:  
23  
24

Dr. [Jacqueline] Farwell testified that the claimant's records show that as of January 16, 2002 the claimant had had a hernia for three months. His records go on to show that the hernia was repaired in May of 2002. Dr. Farwell testified that the claimant's hernia did not satisfy the durational requirements of persisting or being expected to persist for twelve months (internal citation to SSR 82-52). She testified that the claimant did not have symptoms or effects from his hernia for a twelve month period.

(AR. 745).

Although plaintiff notes that he first went to the emergency room ("ER") on April 23, 2001 for pain in the lower right abdominal area, plaintiff admits that "a hernia was not formally diagnosed at that time" (*see* Dkt. 20, p. 9 (*citing* AR. 235)). As noted by plaintiff, the treatment providers "thought that the source of the pain was a kidney stone" (*see id.* (*citing* AR. 225, 229)). *See Ukolov v. Barnhart*, 420 F.3d 1002, 1006 (9th Cir. 2005) (affirming ALJ's finding of no medically determinable impairment at step two because of a lack of a definitive diagnosis); *Sefati v. Colvin*, 2013 U.S. Dist. LEXIS 173252 at \*21-\*22 (W.D. Wash. 2013) ("the Social Security regulations require a diagnosis from an acceptable medical source to establish the existence of a medically determinable impairment") (citations omitted) (unpublished opinion); *see also Griemsmann v. Astrue*, 147 Soc. Sec. Rep. Srv. 286, at \*14-\*15 (W.D. Wash. 2009).

Regarding plaintiff's presentation in April, 2001 with abdominal pain, the record, although not entirely consistent, repeatedly refers to plaintiff's *left* lower quadrant abdominal pain (*see* AR. 227 (location: box checked for left); AR. 228 ("LLQ" [Left Lower Quadrant])); AR. 229 ("Left flank pain"); *but see* AR. 225 ("R flank pain")). Plaintiff eventually was diagnosed with a *right* inguinal hernia (*see* AR. 232 ("swelling in the right inguinal area," diagnosis: "Right inguinal hernia"); AR. 233 (Assessment: "Rt

1 Inguinal Hernia’’)). Therefore, plaintiff’s records do not demonstrate that plaintiff’s  
2 presentment in the ER in April, 2001 was for pain due to a hernia. On April 23, 2001, the  
3 doctor’s diagnostic impression was that plaintiff suffered from left flank pain due to the  
4 1mm stone found in the bladder following a CT examination (*see* AR. 229). Plaintiff did  
5 not receive a diagnosis for hernia in April, 2001 and thus did not establish that he  
6 suffered from the medically determinable impairment of a hernia at that time. *See*  
7 *Ukolov, supra*, 420 F.3d at 1006; *Sefati, supra*, 2013 U.S. Dist. LEXIS 173252 at \*21-  
8 \*22.

9  
10 Also, plaintiff in his Opening Brief notes that plaintiff was brought to the ER on  
11 October 23, 2001 “complaining of severe abdominal pain *for the last two weeks*” (*see id.*  
12 (emphasis added)). This comports with the reliance by the ALJ on the testimony of Dr.  
13 Farwell that plaintiff’s “records show that that as of January 16, 2002 the claimant had  
14 had a hernia for three months” (*see* AR. 745). A review of the record reveals that on  
15 January 16, 2002, plaintiff stated “that he has had a right inguinal hernia over the last  
16 three months” (*see* AR. 232). The ALJ implicitly made the logical inference that had  
17 plaintiff been suffering from hernia pain prior to October, 2001, he would have indicated  
18 as such. Instead, he reported having pain for two weeks previous to October 23, 2001,  
19 and he consistently and contemporaneously reported in January, 2002 that he had been  
20 suffering from hernia pain for the previous three months (*see* AR. 232; *see also* AR. 975).  
21 The Court also notes that at plaintiff’s January, 2002 ER visit, the doctor indicated that  
22 plaintiff’s swelling in the right inguinal area was “easily reduced,” as noted by the ALJ  
23 (*see* AR. 232, 746). Therefore, based on the record as a whole, the Court concludes that  
24



1 the ALJ's finding that plaintiff's hernia became a medically determinable impairment in  
2 early October, 2001 is based on substantial evidence in the record as a whole.

3 Plaintiff's amended alleged onset date is January 16, 2002. As reported by plaintiff, he  
4 had a surgery on June 6, 2002 to repair the hernia (*see* Dkt. 20, p. 10). The ALJ noted that  
5 plaintiff was discharged on June 12, 2002, and at that time, "was walking and stable for  
6 discharge" (*see* AR. 746 (*citing* AR. 252)). The ALJ found that the record supported the  
7 testimony from Dr. Farwell that plaintiff "did not have effects from his hernia that lasted  
8 twelve months or more" (*see* AR. 746).

9  
10 Plaintiff contends that after his discharge in June, 2002, he was suffering from  
11 ongoing symptoms (*see* Dkt. 20, p. 10). However, the Court notes that on June 24, 2002  
12 plaintiff reported an increase in pain because he was playing Frisbee and "overdid  
13 activities" (*see* AR. 262). There is nothing in the record to demonstrate that this was  
14 anything more than an episodic setback. The record supports the ALJ's finding that  
15 plaintiff's hernia improved after his surgery, as did his hernia-related limitations (*see id.*).

16 Plaintiff also directs the Court's attention to an August 6, 2002 treatment record  
17 and argues that he was still suffering from limitations and pain, and that he tried to  
18 schedule an appointment with a surgeon (*see* Dkt. 20, p. 10). However, the record  
19 demonstrates that although plaintiff was allowed to reschedule his August 6, 2002  
20 appointment to August 21, 2002 due to reported concerns about re-herniation, the record  
21 also demonstrates that plaintiff did not show up for his rescheduled appointment on  
22 August 21, 2002 (*see* AR. 260). Dr. Farwell testified that patients with hernias can get  
23 better, and that hernias "sometimes protrude and bulge through . . . the tissue and at  
24

1 other times they don't stick out at all" (*see* AR. 1153). The record provides substantial  
2 evidence for the ALJ's reliance on Dr. Farwell's testimony in order to support the ALJ's  
3 finding that during the relevant period before his date last insured that plaintiff "did not  
4 have effects from his hernia that lasted twelve months or more" (*see* AR. 746).

5 In addition, plaintiff does not direct the Court to any evidence in the record that  
6 plaintiff sought any medical treatment between August 6, 2002 and May 28, 2003, after  
7 he failed to show up for his scheduled appointment (*see* Dkt. 20, pp. 7, 10). Although  
8 regarding a different period of time, Dr. Farwell testified that her inference that plaintiff  
9 was better for a few months was supported by "the fact that he didn't seek medical  
10 attention for his hernia during that time" (*see* AR. 1153).

12 Plaintiff's failure to show up for his August 21, 2002 appointment supports the  
13 ALJ's finding that plaintiff "did not have effects from his hernia that lasted twelve  
14 months or more," as it is a logical inference that if plaintiff was suffering disabling  
15 limitations on August 21, 2002, he would have attended his medical appointment (*see*  
16 AR. 746). The ALJ may "draw inferences logically flowing from the evidence." *Sample*  
17 *v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1999) (*citing Beane v. Richardson*, 457 F.2d  
18 758 (9th Cir. 1972); *Wade v. Harris*, 509 F. Supp. 19, 20 (N.D. Cal. 1980)). Although  
19 plaintiff presents arguments regarding a lack of ability to obtain medical treatment,  
20 plaintiff's failure to show up for a scheduled appointment with a medical doctor belies  
21 this reasoning.

22 As plaintiff has demonstrated only that his hernia began in early October, 2001,  
23 and as the evidence supports the ALJ's finding that any pain and resultant limitations  
24

1 from his hernia were resolved, at least temporarily, before October, 2002, the Court  
2 concludes that plaintiff has not demonstrated that he suffered from any severe hernia pain  
3 or resultant limitations for the required twelve month duration. As noted previously,  
4 plaintiff bears the burden to establish by a preponderance of the evidence the existence of  
5 a severe impairment that prevented performance of substantial gainful activity and that  
6 this impairment lasted for at least twelve continuous months. 20 C.F.R. §§ 404.1505(a),  
7 404.1512(a) and (c), 416.905(a), 416.912(a) and (c); *Yuckert, supra*, 482 U.S. at 146; *see*  
8 *also Tidwell, supra*, 161 F.3d at 601 (*citing Roberts*, 66 F.3d at 182). Any impairment  
9 that does not last continuously for twelve months does not satisfy the requirement. 20  
10 C.F.R. §§ 404.1505(a), 404.1512(a) and (c), 416.905(a), 416.912(a) and (c); *Roberts*,  
11 *supra*, 66 F.3d at 182.

13 Even if the ALJ erred in failing to find the hernia severe, which the Court does not  
14 find, any error would be harmless, as to be a disabling impairment, the impairment must  
15 have existed or be expected to persist for twelve months prior to the date last insured. *See*  
16 *id.*; *see also Tidwell, supra*, 161 F.3d at 601. For example, pursuant to a relevant federal  
17 regulation:

18 The law defines disability as the inability to do any substantial gainful  
19 activity by reason of any medically determinable physical or mental  
20 impairment which can be expected to result in death or which has lasted  
or can be expected to last for a continuous period of not less than 12  
21 months.

22 20 C.F.R. § 416.905(a). Therefore, by definition, if plaintiff's impairment was not  
23 expected to last for a continuous period of at least 12 months before his date last insured,  
24 it did not render him disabled. *See id.* This is the case even if subsequently the

1 impairment became severe or if subsequently it turned out that the impairment recurred.  
2 *See id.*; *cf. Tidwell, supra*, 161 F.3d at 601 (“there is substantial evidence that Appellant’s  
3 physical impairments were not severe prior to the expiration of her insured status”).

4 For the reasons stated, and based on the relevant record, the Court concludes that  
5 the ALJ did not err by failing to find that plaintiff’s hernia was a severe impairment prior  
6 to March 31, 2002, his date last insured. Plaintiff’s argument that this finding is outside  
7 the scope of the Ninth Circuit Court of Appeals remand order will be discussed below,  
8 *see infra*, section 2.  
9

10 **(2) Did the ALJ fail to obey the order of the Ninth Circuit Court of**  
11 **Appeals and change a step 2 medical finding that had not been**  
12 **disturbed on appeal?**

13 Plaintiff argues that because the previous administrative decision of July 28, 2006  
14 included a conclusion that plaintiff’s hernia condition was a severe condition that was not  
15 disturbed on appeal that it “is therefore binding on all parties” (*see* Dkt. 20, p. 11).  
16 Plaintiff does not provide any legal citation representing any authority for this position  
17 (*see id.*). Although plaintiff contends (again without legal authority) that findings of an  
18 ALJ remain binding if they are not reversed or changed on appeal, plaintiff neglects to  
19 acknowledge that the July 28, 2006 opinion was vacated by the Appeals Council on April  
20 14, 2010 and remanded to “an Administrative Law Judge for further proceedings  
21 consistent with the order of the court for the period prior to May 27, 2002” (AR. 752).  
22

23 As the July 28, 2006 written decision included the conclusion that plaintiff was  
24 disabled as of May 27, 2002 (*see* AR. 23); as the Appeals Council remanded only for  
proceedings “for the period prior to May 27, 2002,” (*see* AR. 752); and as the ALJ’s

1 decision subject to this appeal herein explicitly made findings and conclusion regarding  
2 only “the relevant period of consideration for the Title II claim [] from the amended  
3 alleged onset date, January 16, 2002 until the date last insured of March 31, 2002, a  
4 period covering 75 days,” (AR. 741-42; *see also* AR. 749) and the ALJ explicitly in his  
5 April 11, 2013 decision concluded that plaintiff’s disability began on May 27, 2002 (*see*  
6 AR. 749), the decision regarding disability as of May 27, 2002 is not disturbed by the  
7 ALJ’s April 11, 2013 written decision. However, the ALJ’s finding that for “the relevant  
8 period of consideration” prior to March 31, 2002 plaintiff did not have a severe  
9 impairment is a distinct finding; and, as discussed above, *see supra*, section 1, is a finding  
10 based on substantial evidence in the record (AR. 741-42). Thus, although plaintiff argues  
11 that “the scope of the issues on remand was simply to determine the correct onset date of  
12 [plaintiff’s] disability,” and that the “only consideration should have been the medical  
13 evidence before May 27, 2002” (*see* Dkt. 20, p. 12), this is exactly what the ALJ did in  
14 his April 11, 2013 decision: He explicitly considered only “the relevant period of  
15 consideration” (AR. 742); explicitly declined to consider other physical and mental  
16 impairments that “were made outside of the relevant period” (AR. 745); explicitly  
17 discussed the fact that the “Appeals Council remanded the prior decision so that evidence  
18 from a medical expert qualified to address the claimant’s physical condition and  
19 combination of impairments for the period prior to May 27, 2002 could be ascertained”  
20 (*id.*); explicitly incorporated aspects of the former written decision into his written  
21 decision or afforded medical opinions the same weight (*see* AR. 746, 748): and, perhaps  
22 most importantly, explicitly concluded that plaintiff has not been disabled “as defined in  
23  
24

1 the Social Security Act, from January 16, 2002, through May 27, 2002, the date his  
2 disability began” (*see* AR. 749 (citations omitted)). The Court does not find persuasive  
3 plaintiff’s argument that the ALJ strayed beyond “the scope of the issues on remand” (*see*  
4 Dkt. 20, p. 12).

5       Furthermore, the findings by the ALJ in his written decision are not necessarily  
6 inconsistent with the finding that plaintiff’s hernia was a severe impairment as of May  
7 27, 2002, his date last insured. As found by the ALJ, although prior to March, 31, 2002,  
8 his hernia condition was not expected to persist for a continuous period of a year, on May  
9 27, 2002, when plaintiff was shot, his impairments combined, including his hernia, could  
10 be expected to last for at least a year. Therefore, the ALJ’s finding that the hernia was not  
11 severe prior to plaintiff’s gunshot wound, but subsequently was severe, in combination  
12 with his gunshot wound and other subsequent impairments, is logical and based on the  
13 record as a whole.

15       In addition, the Court finds persuasive defendant’s citation to Ninth Circuit and  
16 other authority regarding the law of the case and rule of mandate doctrines (*see* Dkt. 24,  
17 pp. 3-5). For example, as quoted by defendant, “[l]ower courts are free to decide issues  
18 on remand so long as they were not decided on a prior appeal [and] [actual] decision of  
19 an issue is required to establish the law of the case, [which] [] does not reach a matter that  
20 was not decided” (*id.* at p. 3 (internal citations to *Liberty Mut. Ins. Co. v. E.E.O.C.*, 691  
21 F.2d 438, 441 (9th Cir. 1982) and § 4478 Law of the Case, 18B Fed. Prac. & Proc. Juris.  
22 § 4478 (2d ed.))) (other citations omitted)). The Ninth Circuit here did not render any  
23 decision explicitly on whether or not plaintiff’s hernia was a severe impairment (*see* AR.  
24

1 1068-70). Plaintiff implies that the ALJ's finding that plaintiff's hernia was not a severe  
2 impairment until May 27, 2002 is "counter to the spirit of the circuit court's decision"  
3 (*see* Reply, Dkt. 25, p. 4 (*citing United States v. Kellington*, 217 F.3d 1084, 1094-93 (9th  
4 Cir. 2000) (other citations omitted))). However, the Ninth Circuit explicitly indicated that  
5 plaintiff "may have become incapacitated at anytime between [January 1, 2002] and the  
6 onset date the ALJ selected of May 27, 2002" (AR. 1069). Therefore, the ALJ's findings  
7 that plaintiff's hernia impairment was not severe as of March 31, 2002, but was severe as  
8 of May 27, 2002 were explicitly within the direction and "spirit" of the Ninth Circuit's  
9 decision (*see id.*).  
10

11 Plaintiff's remaining arguments similarly are unpersuasive. Although plaintiff  
12 complains about the specialty of the medical expert [ME], plaintiff has cited no authority  
13 that a medical doctor who specialized in pediatric neurology is not qualified to provide  
14 expert testimony of the type provided in this matter (*see* Dkt. 20, p. 12). This ME is a  
15 medical doctor who specialized in neurology, and although area of specialty is relevant, it  
16 does not render a doctor not qualified to render a medical opinion. *Cf. Sprague v. Bowen*,  
17 812 F.2d 1226, 1232 (9th Cir. 1987)) ("[i]f the Magistrate [Judge]'s conclusion that there  
18 was no psychiatric evidence is based on an assumption that such evidence must be  
19 offered by a Board-certified psychiatrist, it is clearly erroneous"); *see also* 20 C.F.R.  
20 404.1527(c)(5).  
21

22 Plaintiff also argues that the ME offered evidence before she was under oath (*see*  
23 Dkt. 20, p. 12). However, as the record indicates, and as noted by defendant, the  
24 "certified record indicated that Dr. Farwell was sworn in twice: at the beginning of the

1 hearing (internal citation to AR. 1140) and again (internal citation to AR. 1148)” (Dkt.  
2 24, p. 5 n.1). Plaintiff does not reply to this argument and it is substantiated by the record  
3 (*see* AR. 1140, 1148).

4 Plaintiff argues that Dr. Farwell “speculates” that plaintiff would gradually  
5 experience increase in function after his surgery (*see* Dkt. 20, pp. 12-13 (*citing* AR.  
6 1148)). However, the Court does not agree with plaintiff’s characterization of the ME’s  
7 testimony. Dr. Farwell indicated that she was “extrapolating from his age and the  
8 procedure he ha[d] undergone” (*see* AR. 1148). It also is clear that she is basing this  
9 opinion in part on her medical expertise as she provided her qualifications, and on her  
10 review of the medical record (*see, e.g.,* AR. 1145, 1146). Although plaintiff argues that  
11 plaintiff’s condition existed for the entire duration, Dr. Farwell testified that it was her  
12 experience that patients with hernias can get better, and that hernias “sometimes protrude  
13 and bulge through . . . . the tissue and at other times they don’t stick out at all” (*see*  
14 AR. 1153; *see also* Dkt. 20, p. 14). As noted by Dr. Farwell, there were significant gaps  
15 in plaintiff’s treatment record, when he was not seeking medical services, and she opined  
16 based on this evidence that plaintiff would have sought medical services if he was  
17 suffering from a disabling impairment (*see* AR. 1152-53).

18  
19 Although plaintiff argues that Dr. Farwell’s opinion in this regard is mere  
20 speculation and argues that plaintiff did not have medical insurance, suggesting that he  
21 could not obtain medical treatment, (*see* Dkt. 20, p. 14), as noted previously, plaintiff  
22 failed to show up for a medical appointment (*see* AR. 260). Plaintiff’s failure to show up  
23 for a medical appointment belies his argument that when he was not seeking services he  
24



1 was still suffering from limitations but could not obtain medical treatment (*see id.*).  
2 Similarly, although plaintiff argues that Dr. Farwell agreed that she had no support for  
3 her opinion that as when plaintiff went to DSHS in April, 2002, DSHS sent plaintiff to  
4 Dr. Puzon, that plaintiff could have gone to DSHS sooner and obtained medical  
5 treatment, Dr. Farwell actually testified that her opinion in this regard was based on her  
6 familiarity with the administrative process of the Department of Labor and Industries and  
7 how they manage their claims (*see* AR. 1154).  
8

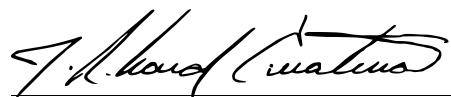
9 For the reasons stated and based on the record as a whole, the Court does not find  
10 persuasive plaintiff's argument that the ALJ erred in failing to find that plaintiff's hernia  
11 was a severe impairment prior to his date last insured of March 31, 2002. This finding is  
12 based on substantial evidence in the record as a whole and is not contrary to any finding  
13 by the Ninth Circuit regarding this matter.

#### 14 CONCLUSION

15 Based on these reasons and the relevant record, the Court **ORDERS** that this  
16 matter be **AFFIRMED** pursuant to sentence four of 42 U.S.C. § 405(g).

17 **JUDGMENT** should be for defendant and the case should be closed.

18 Dated this 8th day of January, 2015.

19  
20 

21 J. Richard Creatura  
22 United States Magistrate Judge  
23  
24